PUNCA KLASIK SDN BHD

v.

FOH CHONG & SONS SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-260-1995]
25 OCTOBER 1996

LAND LAW: *Ownership - Beneficial ownership in dispute - Whether defendant a beneficial owner without registrable transfer - Whether any right conferred - Whether defendants squatters - Whether any legal standing in equity or in law*

LAND LAW: *Indefeasibility of title and interests - Unregistered interest - Whether notice of prior unregistered interest can defeat registration of title - Whether knowledge of prior interest can constitute fraud*

SUCCESSION: *Administration - Sale of land - Whether beneficiary has legal capacity to sell land held under trust - Whether beneficiary has interest in property when administration of estate incomplete*

CONTRACT: *Privity - Consideration - Right of parties*

CIVIL PROCEDURE: *Appeal - Fresh evidence - Whether may be allowed in appellate court*

The plaintiff purchased a piece of land, Lot 4271 ('the said land'), from the trustees of the estate of the late Syed Hassan Ahmad Alattas. The 3rd defendant claimed beneficial ownership of 20,000 square feet out of the said land, whereas the 1st and 2nd defendants were at that time occupying the claimed 20,000 square feet of land. The plaintiff contended that the defendants were trespassing on its land and sought vacant possession under O. 14 of the Rules of the High Court 1980 ('the RHC'). The registrar gave judgment to the plaintiff and the defendants appealed. The issues that had to be decided by the court were: (i) whether the 3rd defendant was the beneficial owner; and (ii) whether the plaintiff was guilty of fraud.

Held:

[1] The purchaser of a piece of land becomes the beneficial owner only upon the completion of the sale that is, when there is timeous payment of the full purchase price and the execution of a valid and registrable transfer in the prescribed form in favour of the purchaser.

[1a] There was no instrument of transfer in any form executed in favour of the 3rd defendant and in law the third defendant could not be said to be the beneficial owner.

[2] A beneficiary has no interest in property in any specific investment forming part of the estate or in the income from any such investment when the administration of the estate is incomplete.

[2a] The administration of the estate of the late Syed Hassan Ahmad Alattas was incomplete and the residuary had not been ascertained. Consequently, none of the beneficiaries of the estate had any interest in any specific property of the said estate.

[3] A non-denial in a trial by affidavit must necessarily be deemed as an admission. It was deposed in the plaintiff's affidavit, that the administration of the estate of the late Syed Hassan Ahmad Alattas was incomplete and the residuary not ascertained, but this was not denied by the defendants in their affidavit-in-reply.

[4] It is an established principle of law that the acquisition of land with notice of a prior unregistered interest in land cannot be construed as fraud. The registration of a title or interest in land will defeat any prior unregistered interest in land.

[5] A contract which purports to confer a benefit on a stranger to the contract cannot be enforced by that stranger. Only parties to a contract can enjoy the benefits of that contract, or suffer the burdens of it. Consideration must flow or move from the promisee. A person cannot simply sue on a contract if the consideration is provided by another, even where the contract is made for his benefit. The 3rd defendant was an entire stranger to the sale and purchase agreement between the plaintiff and the trustees of the estate, and therefore, the exception to the privity concept did not apply.

[6] It is a principle of law that where a party has called no evidence in the court below, the appellate court will not allow the party to adduce fresh evidence.

[7] Squatters have no legal standing in law or in equity, and they can be ousted at will. The defendants were squatters and therefore the plaintiff was within the law to ask them to leave.

[8] The defendants must show triable issues on the basis of the affidavit evidence, that they had title or right to possession consistent with the fact of ownership, to appeal against a judgment of O. 14 of the RHC. The plaintiff had fufilled the preliminary requirement and *prima facie* was entitled to judgment.

[Defendants' appeal dismissed.]

Cases referred to:

Bank Bumiputra Malaysia Bhd v. Mahmud Mohamed Din (Datin Salma Md Jamin, Intervener) [1989] 1 CLJ 1048 ***(cit)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 MLJ 400

Beh Lee Liang v. Chew Sah Suak & Anor [1996] 1 CLJ 173 ***(refd)***

Beswick v. Beswick [1966] 3 All ER 1 ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Personal Representatives of the Estate of Lee Lun Wan Maureen & Anor [1994] 1 CLJ 501

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 ***(refd)***

Chai Yen v. Bank of America National Trust and Savings Association [1980] 2 MLJ 142 ***(refd)***

Ewe Keok Neoh v. Ng Aun Thye [1934] SSLR Vol III 23 ***(refd)***

Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203 ***(cit)***

Hua Daily News Bhd v. Tan Thien Chin & Ors [1986] 2 MLJ 107 ***(refd)***

Hj Abdul Rahman & Another v. Mahomed Hassan [1917] AC 209 ***(refd)***

Jagindar Singh & Anor v. Tara Rajaratnam [1988] 2 MLJ 607 ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1968] 1 MLJ 170

Khoo Teng Seong v. Khoo Teng Peng [1990] 2 CLJ 233 ***(refd)***

Lee Ah Thaw & Anor v. Lee Chun Tek [1978] 1 MLJ 773 ***(refd)***

Lim Hee Chuan v. Toh Phaik Har [1949] MLJ 92 ***(refd)***

Loke Yew v. Port Swettenham Rubber Company Ltd [1913] AC 491 ***(refd)***

Malaysian Australian Finance Co Ltd v. The Law Union & Rock Insurance Co Ltd [1972] 2 MLJ 10 ***(refd)***

Mohd Ali Jahn Yusop Sahibjahn & Anor v. Zaleha Mat Zin & Anor [1995] 1 CLJ 533

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 MLJ 300 ***(refd)***

Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 CLJ 738 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd)***

Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd [1988] 3 MLJ 54 ***(cit)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (M) Sdn Bhd [1980] 2 MLJ 136 ***(refd)***

Portland Managements Ltd v. Harte & Others [1976] 1 All ER 225 ***(refd)***

Public Finance Bhd v. Narayanasamy [1971] 2 MLJ 32 ***(dist)***
Punca Klasik Sdn Bhd v. All Persons in Occupation of the Wooden Houses Erected on a Portion of Land Held under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor & Anor Case [1995] 4 BLJ 337 ***(cit)***
Punca Klasik Sdn Bhd v. Hong King Soon [1996] 2 BLJ 136
Punca Klasik Sdn Bhd v. Liza James & Ors [1996] 3 CLJ 932 ***(refd)***
Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399
Saminathan v. Pappa [1981] 1 MLJ 121 ***(cit)***
T Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(refd)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 MLJ 81 ***(cit)***
Tan Heng Poh v. Tan Boon Thong & Ors [1992] 1 CLJ 1340 ***(refd)***
Tweddle v. Atkinson [1861] 1 B & S 393 ***(refd)***
UMW Acceptance & Credit Sdn Bhd v. Lahad Datu Timber Sdn Bhd & Ors [1992] 2 CLJ 1085
Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor (Dekor Panel Emas Sdn Bhd, Intervener) [1994] 3 CLJ 265 ***(cit)***

Legislation referred to:
National Land Code 1965, s. 340(2)
Rules of the High Court 1980, O. 14, O. 20 rr. 1, 3, O. 56 r. 1(3A)

JUDGMENT

Abdul Malik Ishak J:

The plaintiff in classical style sought vacant possession of 20,000 square feet of land that comprised in and formed part of Lot 4271 which belonged to the plaintiff from the defendants under O. 14 of the Rules of the High Court 1980 ('RHC') as reflected in encl. 19. The O. 14 of the RHC's application came up for hearing before the Senior Assistant Registrar ('SAR') on 9 July 1996 who unhesitantly gave judgment to the plaintiff with costs. The defendants being aggrieved lodged an appeal to the judge in chambers on the same date which was then filed on 10 July 1996 as reflected in encl. 53.

At the outset, it is germane to mention that the writ of summons has been discontinued against the first defendant *vide* a notice of discontinuance dated 22 May 1996 as seen in encl. 49. It is also appropriate to mention that this is not the only case where the plaintiff has sought to emphasise their right to Lot 4271 but there were many more cases of the same nature filed in this court where arguments were advanced on different and divergent grounds. Written judgments were duly delivered and some have since been reported in the journals. To be precise four of these cases have been reported and for expediency they may be cited as follows:

(1) *Punca Klasik Sdn Bhd v. All Persons in Occupation of the Wooden Houses Erected on a Portion of Land Held under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor & Anor Case* [1995] 4 BLJ 337;

(2) *Punca Klasik Sdn Bhd v. Hong King Soon* [1996] 2 BLJ 136;

(3) *Punca Klasik Sdn Bhd v. Liza James & Ors* [1996] 3 CLJ 932; and

(4) *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 5 MLJ 241; [1996] 4 CLJ 399.

The brief facts of the present appeal may be stated thus. On 21 January 1994 the plaintiff became the registered proprietor of Lot 4271 which comprised of all that piece of land held under Grant 26977 in the township of Johor Bahru. The third defendant claimed to be the beneficial owner of 20,000 square feet out of Lot 4271 by virtue of:

(a) an agreement of sale dated 7 February 1940 (exh. 'SKS 1' of encl. 21) between Syed Abdul Rahman bin Hassan Alattas as vendor and Siow Lan as purchaser in respect of sale of 10,000 square feet, referred herein as ('SPA1'); and

(b) an agreement of sale dated 25 April 1949 (exh. 'SKS 2' of encl. 21) between Syed Abdul Rahman bin Hassan Alattas as vendor and Siow Lan Heng as purchaser in respect of sale of 10,000 square feet, referred herein as ('SPA2').

Both 'SPA1' and 'SPA2' contained an identical cl. 1 where it was stipulated that when the vendor had obtained his share of the portion of land from the trustees of the estate of Syed Hassan bin Ahmad Alattas, a new agreement shall be entered into by the parties thereto. Unfortunately, there was no allegation whatsoever of any such new agreements nor was there evidence in documentary forms to show that new agreements have been entered into by the third defendant with the vendor – Syed Abdul Rahman bin Hassan Alattas. The second and third defendants alleged that the plaintiff by entering into the sale and purchase agreement dated 9 July 1991 with the surviving trustees of the estate namely, Syed Salleh bin Abdul Rahman Alattas, Syed Hussein bin Salim Alattas and Syed Abdul Kadir bin Mohd. Alattas must have had notice of the third defendant's interest and, consequently, was guilty of fraud.

It was deposed by Wong Chan Thong in his affidavit in encl. 18 that the third defendant was claiming beneficial ownership whereas the first and second defendants were said to be presently occupying 20,000 square feet of land out of Lot 4271 demarcated in red in the plan without the permission or consent of the plaintiff. It was the plaintiff's case that the defendants have committed

trespass on 20,000 square feet out of Lot 4271. Notices were issued by the plaintiff through its solicitors dated 8 June 1994 and by advertisements in the local newspapers on 3 August 1994, 4 August 1994 and 6 August 1994 informing the defendants of the trespass. Since the plaintiff planned to develop Lot 4271, they were interested in obtaining vacant possession.

It must not be forgotten and it must be put to the forefront the following salient facts:

(1) that Lot 4271 was never subdivided;

(2) that no instrument of transfer in whatever form (whether it be under the Johore Land Enactment 1935 or under National Land Code 1965) was executed in favour of the third defendant;

(3) Syed Abdul Rahman bin Hassan Alattas was never on the register document of title to Lot 4271;

(4) from 28 October 1934 until 14 May 1949, Lot 4271 was registered in the names of the following trustees:

(a) Syed Ahmad bin Hassan Alattas;

(b) Syed Abdullah bin Hassan Alattas;

(c) Syed Salim bin Hassan Alattas; and

(d) Syed Zin bin Hassan Alattas

who held Lot 4271 in trust for the estate of Syed Hassan bin Ahmad Alattas.

(5) that the administration of the estate of Syed Hassan bin Ahmad Alattas was incomplete and the residuary had yet to be ascertained.

As I see it, only two issues relevant to decide the fate of the second and third defendants need be considered. They may be stated simply as:

(1) Whether the third defendant can be considered to be the beneficial owner of the 20,000 square feet of land out of Lot 4271 on the strength of 'SPA1' and 'SPA2'?

(2) Whether the plaintiff was guilty of fraud within the meaning of s. 340(2) of the National Land Code 1965?

The First Issue

The recent decision of the Federal Court in the case of *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad* [1996] 2 CLJ 561 FC would strike at the very cord of the present issue. That case lays down a sound principle of law to the effect that a purchaser of a piece of land becomes the beneficial owner only upon completion of the sale. It envisages a situation where upon timeous payment of the full purchase price and the execution of a valid and registrable transfer in the prescribed form in favour of the purchaser would title then pass to the purchaser from the vendor. Edgar Joseph Jr. FCJ delivering the judgment of the Federal Court aptly stated the law in erudite terms:

> In our view, the contractual events, which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchase, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

As stated earlier that since no instrument of transfer in any form has been executed in favour of the third defendant, the third defendant could not, in law, be said to be the beneficial owner. I would even go to the extent of holding and I so hold that the third defendant could not have obtained a valid and registrable transfer in the prescribed form since Syed Abdul Rahman bin Hassan Alattas (the vendor) was not on the register and was never the registered proprietor of Lot 4271 having regard particularly to the provisions of the Johore Land Enactment 1935 and its successor the National Land Code 1965 (which, *inter alia*, provides that the registered proprietor could execute the prescribed transfer form). It must not be forgotten, as I said earlier, that both the 'SPA1' and 'SPA2' were incomplete and were dependent on a "new" agreement to be signed once Syed Abdul Rahman bin Hassan Alattas as the vendor had obtained his rightful share in the portion of Lot 4271. But unfortunately new agreements were not signed between Syed Abdul Rahman bin Hassan Alattas as the vendor, on the one hand, with that of Siow Lan and Siow Lan Heng as the purchasers, on the other hand. It is pertinent to point out that the third defendant's claims were rejected by the Assistant Registrar, Johor Bahru *vide* Civil Suit No: 20 of 1937 on 24 November 1957 as reflected in exh. 'WCT3' of encl. 40 and for convenience it is reproduced hereinunder:

Dates of Rejection of Claims	Court Dockets	Names of Claimants	Particulars of Properties
23.7.1995	19	Siow Wan Heong	10,000 sq. ft. of Lot No: 12, Section D, Jalan Ngee Heng, Malay Grant No: 1572 (Note: This is the land bought from Syed Abdul Rahman bin Hassan Alattas a beneficiary of the estate on 7.2.1940)
23.7.1995	19	Siow Wan Heong	10,000 sq ft (100ft v. 100ft) in Malay Grant No: 1572 and forming part of Lot 12 Section D, Jalan Ngee Heng. (Note: This land was also bought from Syed Abdul Rahman bin Hassan Alattas on 25.4. 1949).

No appeals were lodged against the decision of the Assistant Registrar, Johor Bahru and this meant that Siow Lan and Siow Lan Heng (referring to one and the same person as Siow Wan Heong when one refers to 'SPA1' and 'SPA2') must have been contented and satisfied with the decision of the Assistant Registrar, Johor Bahru. After a lapse of 41 years three months and two days (calculated from 23 July 1955 to 25 October 1996) the third defendant cannot certainly claim to be the beneficial owner of 20,000 square feet of land out of Lot 4271 when the claim for that very portion was rejected by the Assistant Registrar, Johor Bahru on 23 July 1955. The Deed of Family Arrangement dated 10 September 1959 as reflected in exh. 'WCT2' of encl. 40 purported to ratify claims which have been rejected by the Assistant Registrar, Johor Bahru on 23 July 1955. It is my judgment that the decision of the Assistant Registrar sitting in the Johor Bahru High Court cannot be varied by the Deed of Family Arrangement.

It is a correct proposition of the law to say that a beneficiary has no legal capacity to enter into a valid contract of sale of land held under a trust: *Punca Klasik Sdn Bhd v. All Persons in Occupation of the Wooden Houses Erected on a Portion of Land Held under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor & Anor. Case* [1995] 4 BLJ 337 and *Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi s/o Mookan & Anor And*

Dekor Panel Emas Sdn Bhd (Intervener) [1994] 3 CLJ 265. It is beyond dispute that at the time 'SPA1' and 'SPA2' were entered into, Lot 4271 was a trust property registered in the names of four trustees as stated in the early part of this judgment. Syed Abdul Rahman bin Hassan Alattas who was never listed as a trustee of Lot 4271 could not therefore enter into a legally binding contract of sale with Siow Lan and Siow Lan Heng for those portions of land out of Lot 4271. Syed Abdul Rahman bin Hassan Alattas as a mere beneficiary has no interest in any specific property of the estate of Syed Hassan bin Ahmad Alattas when the administration of the estate was incomplete and the residuary thereof not ascertained as yet. This proposition of law finds support in a number of authorities. For a start reference may be made to the case of *Ewe Keok Neoh v. Ng Aun Thye* [1934] SSLR Vol. III 23, where the Privy Council held the view that until the estate has been fully administered the beneficiary has no property in any specific investment forming part of the estate or in the income from any such investment. Then there is the case of *Lee Ah Thaw & Anor v. Lee Chun Tek* [1978] 1 MLJ 773 FC, where briefly the facts were that the appellants who claimed to be beneficiaries under the will of their deceased father had brought an administration suit against the executor and they had caveated the lands belonging to the estate. The respondent applied to have the caveat removed and the learned judge of the High Court made an order accordingly. The appellants appealed to the old Federal Court. That appeal was dismissed as the old Federal Court was of the view that the appellants as residuary beneficiaries, did not have a caveatable interest in the lands since the administration of the estate was incomplete and the residue was unascertained. Lee Hun Hoe CJ (Borneo) (as he then was) delivering the judgment of the old Federal Court had this to say:

> The contention of appellants that they have caveatable 'interest' in the property of the testator's estate because they are the beneficiaries and entitled to the residue of the estate cannot be supported since the administration has not been completed. If, by their contention, they mean that they have certain equitable interest in any specific asset while the administration was incomplete then such contention would be in conflict with such high authorities as *Lord Sudeley & Others v. The Attorney-General* [1897] AC 11; *Dr. Barnardo's Homes National Incorporated Association v. Commissioners for Special Purposes of the Income Tax Acts* [1921] 2 AC 1 and *Commissioner of Stamp Duties v. Livingston* [1964] 3 All ER 692. The testator's property was vested in his executor for the purpose of administration of his estate and no one else has any property interest on such property. It may seem incredible to deny to a residuary beneficiary any interest in those assets of an incomplete administered estate. It has been mistakenly assumed that for all purpose and at every moment of time the law requires the existence of two different kinds of estate or interest in those properties, the legal and the equitable.

Next would be the case of *Khoo Teng Seong v. Khoo Teng Peng* [1990] 2 CLJ 233 where Lim Beng Choon J succinctly said at p. 41:

> The legal principle that a legatee of a share in residue has no interest in any property of the testator until the residue has been ascertained and that his right is only to have the estate properly administered and applied for his benefit when the administration is complete has been unanimously voiced by judicial opinions stretching over a period of nearly 100 years. The leading case advocating this principle is the case of *Lord Sudeley & Ors v. A.G.* [1897] AC 11.

The then Supreme Court in the case of *Tan Heng Poh v. Tan Boon Thong & Ors* [1992] 1 CLJ 1340 approved the decisions in *Lee Ah Thaw (supra)* and *Khoo Teng Seong (supra)* which established the principle that where the administration was incomplete "the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained." In the same vein, I did say in *Punca Klasik Sdn Bhd v. Liza James & Ors* [1996] 3 CLJ 932 especially at p. 946 to this effect:

> It is a correct assertion of the law that anything belonging to the estate must necessarily belong to the executors and the beneficiaries have no right to assert that they have any interests or rights to the properties of the estate until the estate has been fully administered.

It was asserted categorically and deposed in encl. 40 that the administration of the estate of Syed Hassan bin Ahmad Alattas was incomplete and the residuary not ascertained. This was not denied by the defendants in the affidavit-in-reply of Siow Kwong Shang @ Siow Kwang Joon in encl. 41. A non denial of this nature particularly in a trial by affidavit must necessarily be deemed as an admission. Gopal Sri Ram JCA eruditely said in *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 MLJ 281 especially at p. 286 to this effect:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is normally treated as an admission by him of the fact so asserted: *Alloy Automobile Sdn Bhd v. Perusahaan Iron field Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332.

It is appropriate, at this juncture, to refer to encl. 40 and that would be the affidavit of Wong Chan Thong affirmed on 6 April 1996 where two exhibits were put for scrutiny of this court. One was exh. 'WCT1' involving the Will of the late Syed Hassan bin Ahmad Alattas that was made on 3 March 1932 where by cl. 14 thereof the executors and trustees were supposed to sell and divide the proceeds of sale according to the Mohamedan Law and that being

the case, the beneficiaries under the Will were not entitled to any specific property of Lot 4271. The other was exh. 'WCT2' showing the Deed of Family Arrangement dated 10 September 1959 and of particular interest would be cl. 3 where it expressly stipulated certain outstanding liabilities and claims which have to be settled. This meant that the liabilities of the estate of the late Syed Hassan bin Ahmad Alattas were not yet ascertained and identified. Now, applying the law as set out above to the facts of the present case an irresistible conclusion can be arrived at and that would be that the administration of the estate of the late Syed Hassan bin Ahmad Alattas was incomplete and the residuary has not been ascertained and, consequently, none of the beneficiaries of the estate of the late Syed Hassan bin Ahmad Alattas had any interest in any specific property of the said estate.

If at all the third defendant has any right, it would be contractual in nature and that would be against Syed Abdul Rahman bin Hassan Alattas. That would be my judgment and I so hold accordingly. The third defendant has no real right to the 20,000 square feet of land out of Lot 4271. To borrow the words of Lord Dunedin in the case of *Haji Abdul Rahman And Another v. Mahomed Hassan* [1917] AC 209 PC and to apply it to the context of this case, both 'SPA1' and 'SPA2' are "valueless as a transfer or burdening instrument" and they are "good as a contract." On the issue of a contractual right, Gill FJ in *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224 FC especially at p. 228 had this to say:

> As regards the relationship between the parties to a contract for the sale of land to which a title can be obtained only by the registration of a valid transfer as required by law, the position would appear to be quite clear from what has been said in the following cases. Lord Hobhouse in delivering the judgment of the Privy Council in *Crowly v. Bergtheil* [1899] AC 374, 390 said:
>
> > ... by the law of Natal a purchaser of land, though he may have paid the price, is not until regular legal transfer the owner of the land, but is only one who has a claim against the vendor. To speak of him as the true owner in the language of an English Court of Equity, though the expression may be used in speech for brevity's sake, is not correct, ...

Going further down the same page of the same judgment, Gill FJ continued:

> Taking some of the local cases on the point, Thorne J in *Tan Ah Boo v. The State of Johore* [1934] MLJ 142, 151 said:
>
> > It would appear that the right of the purchaser under the system of conveyancing in which registration of title obtains is somewhat analogous to that of the *Roman Fidei Commissum*, so that the purchaser who has paid the whole of his purchase price has no estate, properly so called,

> in the land agreed to be purchased, but has rights which rest in contract, and which may or may not, according to the circumstances of the particular case, entitle him to sue and to invoke the equitable principle of specific performance. To state the matter in another way, the purchaser has no rights in rem but has only a right in personam against the vendor.

An argument was advanced to the effect that the plaintiff had knowledge of the third defendants beneficial interest by virtue of cl. 1 to the sale and purchase agreement dated 9 July 1991 which, *inter alia*, stated that the plaintiff purchased Lot 4271 on an "AS IS" basis without vacant possession and subject to all the existing occupiers, squatters, tenants and/or claimants. A short answer to this would be as follows. There was no evidence that the plaintiff knew particularly of the third defendant's beneficial interest to Lot 4271. When the statement of claim was first filed, the third defendant was not cited as a party. It was on 8 December 1995, under O. 20 r. 1 and r. 3 of the RHC that the writ was amended and the statement of claim too was amended to incorporate the third defendant. Prior to 8 December 1995, the plaintiff thought that only the first and second defendants were "menduduki sebahagian tanah yang terkandong di bawah Geran No: 26977, Lot No: 4271, Bandar Johor Bahru" and thus it was on this basis that the plaintiff sued the first and second defendants for trespass. It was when the statement of defence and counterclaim were filed that it became clearer that the first defendant was not in occupation of part of Lot 4271 (hence the discontinuance as adverted to earlier), while the second defendant was said to be in occupation of part of Lot 4271. The third defendant on the other hand claimed to be the beneficial owner of 20,000 square feet of land out of Lot 4271. It must be borne in mind that the sale and purchase agreement dated 9 July 1991 did not talk about the right of the third defendant on Lot 4271. Of course, the plaintiff knew that they purchased Lot 4271 without vacant possession and it is for the plaintiff, as they now do, to secure vacant possession on their own.

On the facts there would be only one conclusion and that would be this. The third defendant was not and could not have been the beneficial owner of the 20,000 square feet of land out of Lot 4271.

The Second Issue

It is interesting to note that particulars of fraud have not been pleaded. Nevertheless it was ingeniously argued and put forth in the affidavits and in the amended statement of defence and counterclaim that the plaintiff had actual notice of the rights and or interests of the second and third defendants to the 20,000 square feet of land comprised in and forming part of Lot 4271 on the following set of facts:

(1) The sale and purchase agreement dated 9 July 1991 between the plaintiff and the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas contained a crucial cl. 1 which stipulated that: "The vendors shall sell and the purchaser shall buy the said land on an "AS IS" basis and upon the terms and conditions herein contained without vacant possession and subject to all the existing occupiers, squatters, tenants and/or claimants as aforesaid for the consideration of Malaysian Ringgit Twenty-Four Million (MYR24,000,000 only (hereinafter referred to as 'the purchase price').

(2) The order for sale obtained by the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas on 29 February 1992 embodied the same cl. 1 as found in the sale and purchase agreement dated 9 July 1991 where reference was made to the fact that the land was to be sold on an "AS IS" basis. Item 1(d)(vii) of the order for sale dated 29 February 1992 was worded thus:

> Tanah tersebut mesti dijual secara 'as is' tanpa milikan kosong (vacant possession) termasuk kaveat, setinggan, penyewa serta apa-apa tuntutan terhadapnya

(3) It was said that the plaintiff was aware that Lot 4271 was valued at RM52,800,000 with vacant possession and that the purchase price of RM24,000,000 which the plaintiff purchased from the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas was a price that took into account that Lot 4271 was purchased without vacant possession and subject to all the rights and interests attached therein.

Flowing from these, it was the third defendant's stand that the plaintiff's knowledge of (1), (2) and (3) above constituted an unconscionable conduct on the part of the plaintiff that amounted to fraud in the context of the case of *Public Finance Bhd v. Narayanasamy* [1971] 2 MLJ 32. At the outset, it must be emphasised that the facts in *Public Finance Bhd v. Narayanasamy (supra)* are poles apart from the present case. There the respondent had purchased a large piece of land with the view to re-selling sub-divided portions thereof. The respondent executed a charge over 187 acres of the land to secure the repayment of RM440,000 to the appellants. The appellants knew as a fact that the charged land had been fragmented and over 100 acres thereof resold to sub-purchasers who had gone into possession of their respective areas upon part-payment of approximately 4/7 of the purchase price. The appellants subsequently applied to court for an order for sale of the whole of the 187 acres charged to them to recover the principal and interest due to them. Three of the sub-purchasers applied to be added as respondents. The object of these sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any orders of sale made by the court. The appellants opposed the intervention of the sub-purchasers and contended that they need pay no

regard whatsoever to the rights of the sub-purchasers. The learned trial judge found that the appellants were guilty of fraud and collusion and dismissed the application of the appellants. On appeal, the old Federal Court dismissed the appeal and held that the appellants' insistence that the interveners had no rights whatsoever, except with a right to damages against the respondent for breach of contract, was so plainly unconscionable that the learned judge was justified in holding that they were guilty of fraud and collusion. Ong CJ (Malaya) delivering the judgment of the old Federal Court had this to say (see pp. 33 to 34):

> The appellants' insistence that the interveners had no rights whatsoever – except a right to damages against the respondent for breach of contract – is so plainly unconscionable that we are not at all surprised that the judge was driven to find fraud and collusion. We would have done the same. Had they conceded that the sub-purchasers were entitled to the lands they had paid for, it would have been impossible for any court to say that they intended to perpetrate a fraud. But by their own choice, they had affixed the label on themselves. They cannot claim the same protection as purchasers for value without notice. In our opinion the grounds of appeal were frivolous and entirely vexatious.

In the early part of the same judgment of the same case, Ong CJ (Malaya) said:

> It is crystal clear that the object of these three sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any order of sale made by the court. We have no doubt whatsoever in our minds that they are entitled to a decree of specific performance against the respondent. They had fulfilled their part of the contract and nothing remains but for the respondent to execute transfers to them when separate titles are issued.
>
> We understood that the appellants had appealed mainly in order to remove the reflection cast on their reputation by the judge's finding of fraud. The remedy, which they and their legal advisers completely overlooked, lies entirely in their hands. They had chosen to oppose the intervention by the sub-purchasers. They claimed their full pound of flesh, as registered chargees, and contended that they need pay no regard whatsoever to the rights of sub-purchasers. It was argued that, had any of them paid up in full at the time of execution of the charge, their case might have been unanswerable. The simple answer is that the appellants were aware of their inchoate rights against the respondent and that completion by them in due course may be fully expected by reason of the substantial sums already paid. What matters is that at the time the appellants applied for an order of sale the three sub-purchasers were beneficial owners of their 45 acres. By their intervention they merely asked that their legal rights should be recognised. And be it noted, their application was not opposed by the respondent.

Clearly, the facts in *Public Finance Bhd v. Narayanasamy (supra)* can readily be distinguished from the present case. That case did not involve the purchase of a piece of land from the surviving trustees of the estate of the deceased nor does it involve and revolve on the issues of the incompleteness of the administration of the estate of the deceased and its residuary not been ascertained as yet. That case too did not touch on the issue as to the legal capacity of a beneficiary that enters into a valid contract of sale of land held under a trust. My understanding of that case impels me to say that the old Federal Court was not concerned as to whether there was a need to condescend on particulars of fraud and neither was there any argument that the particulars of fraud should be particularised. Here, the point was vigorously advanced that the particulars of fraud should be itemised and its failure must be treated as fatal: *Hua Daily News Bhd v. Tan Thien Chin & Ors* [1986] 2 MLJ 107 SC, and *Ng Ah Ba @ Ng Looi Seng & 2 Others v. Ramanda Sdn Bhd* [1996] 1 CLJ 738 CA. Fraud under s. 340 of the National Land Code 1965 must mean actual fraud and not constructive or equitable fraud: *Beh Lee Liang v. Chew Sah Suak @ Chew Sau San & Anor* [1996] 1 CLJ 173 citing *Tai Lee Finance Co. Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81 FC and *Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54. Since the plaintiff became the registered proprietor of Lot 4271 on 21 January 1994, the concept of indefeasibility became attached to the plaintiff. In *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 PC, Lord Diplock said in similar vein:

> In the National Land Code it is s. 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority.

It is my judgment that none of these exceptions as propounded by Lord Diplock in *T. Damodaran (supra)* apply to the instant case. For myself, the question of critical substance at the end of the day, so far as this part of the case is concerned would be this: Has fraud been proved beyond reasonable doubt? If authority is needed for this heavy burden reference may be made to *Saminathan v. Pappa* [1981] 1 MLJ 121, per Lord Diplock at p. 126. Edgar Joseph Jr. J (as he then was and now FCJ) applied the same test in *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1990] 2 CLJ 203. The answer would be in the negative. That the plantiff knew that they purchased Lot 4271 without vacant possession and with all the existing occupiers, squatters, tenants and/or claimants cannot turn the plaintiff, by any stretch of the words, nor affix a label to the plaintiff as an unconscionable conduct that would amount to fraud. Knowledge on the plaintiff's part of all these factors cannot make them fraudulent. It is for the third defendant to prove fraud on the plaintiff's part beyond reasonable doubt.

The third defendant relied on the Privy Council's case of *Loke Yew v. Port Swettenham Rubber Company, Limited* [1913] AC 491 to drive home the point that this court should rectify the register so as to enable the third defendant to be the proprietor of 20,000 square feet of land out of Lot 4271. On rectification, Lord Moulton delivering the judgment of the Privy Council in *Loke Yew* had this to say at p. 504:

> The conclusion to which their Lordships have come as to the transfer having been obtained by fraud brings the case within the exception to s. 7 and is therefore a sufficient answer to these arguments. But their Lordships are of opinion that for other reasons they are irrelevant and beside the mark. They take no account of the power and duty of a court to direct rectification of the register. So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the register or the correction of existing entries it can order the necessary acts to be done accordingly. It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do, and inasmuch as the registration of this absolute transfer of the whole of the original grants was not an honest act under the circumstances it cannot better the position of the plaintiffs as against the defendant and they cannot rely on it as against him when seeking to enforce rights which formally belong to them only by reason of their own fraud. It must be remembered that in the present case the defendant immediately on the bringing of the action applied to rectify the register and that much rectification only awaits the event of this suit. His right to it is set up in the defence, so that he has taken all the necessary steps to obtain the full relief to which he is entitled.

One must not forget that rectification was allowed in *Loke Yew* because the Privy Council found, on the facts, that the respondents obtained the transfer by fraud and misrepresentation. Here there was no fraud perpetrated by the plaintiff as against the third defendant when the plaintiff purchased Lot 4271 from the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas. This is my judgment and I so hold accordingly. I too hold that there was no fraud when the plaintiff became, in law, the registered proprietor of Lot 4271 on 21 January 1994. There was therefore no necessity to rectify the register for the benefit of the third defendant.

Certain general principles must be put to the forefront and given its due prominence. Thus, it is an established principle of law that the acquisition of land with notice of a prior unregistered interest in land cannot be construed as fraud: *Beh Lee Liang v. Chew Sah Suak @ Chew Sau San & Anor (supra)* and *Goh Hooi Yin v. Lim Teong Ghee & Ors (supra).* Another important general principle of law that needs to be re-emphasised would be this: The registration of title or interest in land would certainly defeat any prior unregistered interest in land: *Beh Lee Liang v. Chew Sah Suak @ Chew Sau San & Anor (supra); Tai Lee Finance Co. Sdn Bhd v. Official Assignee & Ors (supra);* and *Bank Bumiputra Malaysia Berhad v. Mahmud bin Hj. Mohamed Din (Datin Hajjah Salma bte Md. Jamin, Intervener)* [1989] 1 MLJ 381. For completeness it is appropriate to refer to these cases. I said in *Beh Lee Liang's* case *(supra)* at p. 189 to this effect:

> Now, upon registration of the title the plaintiff in whose favour the registration has been effected, will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code), that is to say, a title or an interest which is free of all adverse claims or encumbrances not noted on the register (see *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong And 54 Others* [1994] 2 AMR 25: 1296). Bluntly put, the effect of registration is to defeat all prior unregistered interests.

In *Tai Lee Finance (supra),* Abdul Hamid FJ (who later rose as the Lord President) cited with approval the case of *P.J.T.V. Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 where Raja Azlan Shah CJ Malaya (now His Majesty) said:

> As it stands the registered title of the said land in the hands of the second and third appellants is indefeasible. The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. Therefore the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in that land unless the party who acquires the registered title has been guilty of fraud (see s. 340(2)(a) of the National Land Code) ...

In *Bank Bumiputra's* case *(supra),* Peh Swee Chin J (now FCJ) stated at p. 382:

When the exceptions in the said s. 340 do not apply as they did not apply to the instant case, the supervening title would defeat a prior equitable right or interest:

> *Ong Chat Pang v. Valliappa Chettiar* [1971] 1 MLJ 224. The chargee, to quote a familiar expression, had therefore succeeded in the scramble to get on the register and had therefore emerged victorious.

On the facts and on the authorities, I am constrained to hold and I so hold that the unregistered and the unregistrable interest of the third defendant to the 20,000 square feet of land out of Lot 4271 by virtue of 'SPA1' and 'SPA2' cannot defeat the supervening title which the plaintiff had on Lot 4271. In the "scramble to get on the register" the plaintiff succeeded to beat the third defendant to it. Without a doubt, the plaintiff's title to Lot 4271 was indefeasible.

That is not the end of the matter. The third defendant sought to argue that the concept of privity of contract was severed or at least cut across when the plaintiff purchased Lot 4271 with the knowledge that it was purchased without vacant possession and with all the existing occupiers, squatters, tenants and/or claimants. It was with this knowledge, so it was argued, that the concept of the privity of contract would not apply in regard to the sale and purchase agreement dated 9 July 1991 entered between the plaintiff and the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas in regard to the purchase of Lot 4271. Reliance was heavily placed on two authorities. The first was *Malaysian Australian Finance Co. Ltd v. The Law Union & Rock Insurance Co. Ltd* [1972] 2 MLJ 10, while the second was *Beswick v. Beswick* [1966] 3 All ER 1.

Mohamed Azmi J (now FCJ) in the *Malaysian Australian Finance Co. Ltd's* case *(supra)*, in a well written judgment, emphasised the distinguishing features of the case at p. 11 in these words:

> In the proposal form dated 11 April 1968, it was disclosed to the respondent that the tractor in question was subject to a hire purchase agreement and the applicant was specifically named therein as the owner. Further, the applicant's interest is endorsed on the policy and there can be no doubt that both Choong Kok Hing and the respondent knew that the policy was in a large measure effected on the applicant's behalf and for its benefit, although Choong Kok Hin was the only person described as the insured in the policy. The fact that the contractual rights of Choong Kok Hin to receive money has been subrogated, in that the applicant is given the prior right to receive money under the policy, shows, to my mind, that the policy has been effected by Choong Kok Hing on the applicant's behalf. Having regard to the hire purchase agreement, the proposal form and the insurance policy as a whole, it is reasonable to infer that the intention of Choong Kok Hing in effecting the policy and of the respondent in issuing the same, was primarily to cover the applicant's interest so long as the applicant was the owner of the tractor in question, although the policy did cover Choong Kok Hing's interest as well. The fact that the respondent has disclaimed any liability to Choong Kok Hing's claim does not affect the applicant's insurable interest in the policy. Monies could still be payable under the policy, and, as such, the applicant is a party to the contract and should be entitled to institute claims against the respondent in its own name.

Even if the applicant is a stranger to the contract of insurance and therefore cannot ordinarily sue on the basis of it, this general rule of law is not absolute and is subject to some exceptions which are definite and recognised. One of these exceptions is where there is a direct agreement to pay to or the respondent constitutes itself as the agent of the third party. This particular exception is illustrated at p. 282 of Sanjiva Row's commentaries on *Indian Contract Act and Law Relating to Tenders*, 6th Edn, Vol. 1, where the writer said:

> Yet another exception to the general rule is afforded where the promisor, between whom and the stranger no privity exists, creates privity by his personally agreeing with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally.

The other exception is where a trust is created which is illustrated by Sanjiva Row at p. 278 as follows:

> A third party who is to be benefited under a contract between A and B acquires equitable rights *ex contractu* if the agreement between the parties is so framed as to make one of them a trustee for the third party. In *Gandy v. Gandy* [1885] 30 Ch. D 57 at 67, Cotton LJ put the matter thus: 'If the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial interest as *cestui que* trust under that contract; then B would, in a court of equity, be allowed to insist upon and enforce the contract.

Can the sale and purchase agreement dated 9 July 1991 between the plaintiff and the surviving trustees of the estate of the late Syed Hassan bin Ahmad Alattas be construed generously so as to secure a benefit to the third defendant in relation to the 20,000 square feet of land? A perusal of the sale and purchase agreement do not show this trend at all. The third defendant was an entire stranger to the sale and purchase agreement dated 9 July 1991 and, consequently, the exception to the privity concept do not apply here.

Beswick v. Beswick (supra) a decision of the Court of Appeal which was overruled by the House of Lords as reported in [1967] 2 All ER 1197 cannot help the third defendant at all. The House of Lords overruled the decision of the Court of Appeal and the House of Lords held the view that a contract which purports to confer a benefit on a stranger to the contract cannot be enforced by that stranger.

Punca Klasik Sdn Bhd v. All Persons in Occupation of the Wooden Houses Erected on a Portion of Land Held under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor & Anor Case (supra) cited Kepong Prospecting Ltd & Ors v. Schmidt [1968] 1 MLJ 170; *UMW Acceptance & Credit Sdn Bhd v. Lahad Datu Timber Sdn Bhd & Ors* [1992] 2 CLJ 1085; *Borneo Housing Mortgage Finance Bhd v. Personal Representatives of the*

Estate of Lee Lun Wan Maureen & Anor [1994] 1 MLJ 209; and *Mohd. Ali Jahn bin Yusop Sahibjahn & Anor v. Zaleha Mat Zin & Anor* [1995] 1 CLJ 533 for the proposition that strangers to the contract cannot benefit from that contract. The doctrine of privity of contract is well known. It provides that only parties to a contract can enjoy the benefits of that contract or suffer the burdens of it. Consideration must flow or move from the promisee; a person cannot simply sue on a contract if the consideration is provided by another, even where the contract is made for his benefit. A good example would be the case of *Tweddle v. Atkinson* [1861] 1 B & S 393; 121 ER 762 (QB) where John Tweddle and William Guy each agreed to pay a sum of money to the plaintiff (Tweddle's son) in consideration of his marrying Guy's daughter. Guy failed to pay and the plaintiff sought to enforce his promise against Guy's executor. It was held that the son could not enforce the promise despite the fact that the contract was for his benefit since he had given no consideration for it. Be that as it may, it is surprising to note that the third defendant in encl. 51 para. 7 adopted a somewhat different stand when it was deposed that:

> Selanjutnya defendan-defendan sesungguhnya percaya bahawa soal previti kepada perjanjian tersebut tidak wujud kerana tuntutan defendan-defendan ke atas tanah tersebut adalah satu tuntutan benefisal.

The translation of this would be as follows:

> Further the defendants verily believe that the issue of privity to the said agreement does not arise because the defendants claim to the said land is a beneficial claim.

In a supplementary written submission, the learned counsel for the defendants introduced fresh evidence in the form of two Orders of the courts dated 17 September 1959 and 29 February 1992 respectively. It was urged upon me to accept the fresh evidence in the interest of justice. The short answer would be that the reception of such evidence must be by way of an affidavit and alternatively there was nothing on record to show that these two Orders of the courts were not available before the SAR or for that matter reasonable diligence would not have made it available. Neither was there evidence that this fresh evidence would have had or would have been likely to have had a determining influence upon the decision of the SAR (see O. 56 r. 1(3A) of the RHC). It was not explained as to the delay of the defendants in obtaining the fresh evidence save that this court was urged to take cognisance of the two court Orders. On the issue of fresh evidence, two reported decisions in the country should be cited. The first would be *Chai Yen v. Bank of America National Trust and Savings Association* [1980] 2 MLJ 142 where the then Federal Court refused an application for the introduction of fresh evidence on the grounds that the applicant had not shown that the evidence could not have

been obtained with reasonable diligence for use at the trial and the document in question had no relevance. The second is the case of *Jagindar Singh & Anor v. Tara Rajaratnam* [1988] 2 MLJ 607 where the plaintiff sought to set aside or vary the judgment of a previous action heard *inter partes,* on the ground of discovery of new evidence. The court held that the present writ amounted to re-opening of the case by way of introducing fresh evidence where the issues had been laid to rest by the Privy Council.

It is a principle of law now well crystallized that where a party had called no evidence in the court below, the appellate court would not allow him to adduce fresh evidence. The court in *Lim Hee Chuan v. Toh Phaik Har* [1949] MLJ 92 laid down a general principle to the effect that the courts are reluctant to give any litigant a second chance to adduce at a later stage evidence that was in the litigant's possession in the lower court. For these reasons, I refused to allow the reception of that fresh evidence. In the event I am wrong, I must now proceed to examine these two court Orders. The Order of the court dated 17 September 1959 which was an order emanating from chambers purportedly "approved and sanctioned" the "Deed of Family Arrangement and Settlement dated 10 September 1959" which was said to "be binding on all parties." But alas the Order of the court dated 17 September 1959 did not advert to nor vary the Order of the Assistant Registrar, Johor Bahru dated 24 November 1957 and that Order of the Assistant Registrar, Johore Bahru once and for all laid to rest the claims of Siow Wan Heong. In my judgment, the Order of the Assistant Registrar, Johor Bahru dated 24 November 1957 is still a valid and binding Order of the court till today as it was never varied in any way by anyone. In regard to the Order of court dated 29 February 1992 – a recent Order that should not have slipped the attention of the learned counsel for the defendants where by an exercise of reasonable diligence its presence would be known contained cl. (vii) which reads as follows:

> Tanah tersebut mesti di jual secara 'as is' tanpa milikan kosong (vacant possession) termasuk segala apa jenis encumbrances terhadapnya termasuk kaveat, setinggan, penyewa serta apa-apa tuntutan terhadapnya.

It is too well known that the plaintiff purchased Lot 4271 on an "as is" basis without vacant possession and with the encumbrances of existing occupiers, squatters, tenants and/or claimants thereto. This very case is a clear example of the plaintiff's concerted attempt at obtaining vacant possession of Lot 4271 from the defendants. What the plaintiff is now doing is in strict compliance with the Order of court dated 29 February 1992 – having purchased Lot 4271 without vacant possession they are now seeking vacant possession from this court.

Next, it was argued that the notices issued by the plaintiff's solicitors dated 8 June 1994 to the occupiers of Lot 4271 did not specifically mention the first, second and third defendants and, consequently, those notices in so far as they relate to the second and third defendants were said to be defective. The short answer would be this. The amended statement of claim which was served on the second and third defendants constituted good notice to them.

It was the plaintiff's case that the second and third defendants were nothing more than mere squatters. Squatters have no legal standing in law or in equity and they can be ousted at will. It was because of this that the plaintiff by encl. 19 sought for an O. 14 of the RHC's application. The requirements of an O. 14 application have been lucidly laid down by Seah FJ (as he then was) in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 FC especially at pp. 301 to 302 where his Lordship said:

> It is to be observed that a case is not within O. 14(a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O. 14 as coming within r. 1(2); (c) where the affidavit in support of the application is defective, e.g. in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the Government (O. 73 r. 5(1)).
>
> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see O. 14 rr. 3 and 4(1)).

In *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 MLJ 400 SC, Mohamed Azmi SCJ speaking for the then Supreme Court by way of a majority decision said:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey* [1949] 1 All ER 197 and *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508 at p. 516).

These authorities established the now famous rule that the burden must rest on the defendants to show triable issues, on the basis of the affidavit evidence, which must necessarily be arguable issues and not just any issues. In my judgment, the plaintiff has fulfilled the preliminary requirements as stipulated by Seah FJ (as he then was) in the *National Company's* case and the plaintiff, *prima facie,* was entitled to judgment forthwith.

It is beyond per adventure that the plaintiff is the registered proprietor of Lot 4271 and intends to obtain vacant possession. In my judgment, on the facts, the plaintiff is entitled to vacant possession and the burden shifts to the defendants to confess and avoid by setting up a title or right to possession consistent with the fact of ownership: *Portland Managements Ltd v. Harte & Others* [1976] 1 All ER 225 CA. The defendants failed to discharge that burden. The outcome is obvious. Enclosure 53 should be dismissed with costs.

Reported by Anne Soh

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